No. 97-1425

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

KARL ROBERTS,

Petitioner,

vs.

UNIDYNAMICS CORPORATION d/b/a CRANE NATIONAL VENDORS,

Respondent,

-and-

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNIDYNAMICS CORPORATION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eighth Circuit applied the correct standard of review of the district court's judgment denying Respondents' motions for judgment as a matter of law following a jury verdict in favor of Petitioner on his claims under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.050.

RULE 29.6 STATEMENT

Respondent Unidynamics Corporation d/b/a Crane National Vendors, defendant below, has no parent corporation and no nonwholly owned subsidiaries.

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OPINIONS BELOW

The Judgment and the Order and Memorandum Opinion of the United States District Court for the Eastern District of Missouri granting in part and denying in part the motions for amendment of jury verdict, entered on February 26, 1996, are unreported and are reprinted in Appendix B of the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the district court's judgment is reported at 126 F.3d 1088 (8th Cir. 1997), and is reprinted in Appendix A of the Petition for Writ of Certiorari. The Eighth Circuit's order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted in Appendix A of the Petition for Writ of Certiorari at page 18.

STATEMENT OF THE CASE

Petitioner Karl Roberts [hereinafter "Petitioner" or "Roberts"] was discharged from his position as a welder at Respondent Unidynamics Corporation d/b/a Crane National Vendors [hereinafter "Crane"] on October 9, 1992, for repeated acts of insubordination towards his supervisor. During his employment, Roberts was a member of Respondent District No. 9, International Association of Machinists and Aerospace Workers [hereinafter "District 9" or "union"] and subject to a collective bargaining agreement between Crane and the union.

After his discharge, Roberts filed a complaint alleging that Crane had violated the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213, and the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.050, by terminating him because of the actual disabilities of Graves disease and burns scars and the perceived disabilities of Graves disease, human immunodeficiency virus ("HIV") and Acquired Immune Deficiency Syndrome ("AIDS"). Roberts also

contended that District 9 had violated the ADA and the MHRA by failing to represent him adequately in his discharge grievance procedure because of the same alleged actual and perceived disabilities. On August 23, 1995, the district court entered partial summary judgment for both Crane and the union on Roberts' claims that he was discriminated against because of the actual disabilities of burns scars and Graves disease, leaving for trial only Robert's claims that he had been discriminated against based on perceived disabilities.

The legal issues in the case were tried before a jury from September 12 through September 19, 1995. At trial, evidence was presented that Roberts had never been diagnosed with HIV or AIDS, but had been diagnosed with Graves disease, a hyperthyroid condition, in early 1992. Some of Roberts' co-workers testified that in early 1992 they noticed that Roberts was losing weight, had bulging eyes and a sunken face, and looked fatigued. Other co-workers testified that they did not notice any change in Roberts' physical appearance in 1992. After the diagnosis, Roberts' condition was controlled through medication and his symptoms were alleviated. Roberts' doctor testified at trial that by June of 1992, less than two months after diagnosis of the disease, Roberts' weight had increased, his heart rate had improved and that he was recovering from the disease because of the medication. At least one of Roberts' co-workers testified that Roberts' physical appearance improved prior to October of 1992 and that he had regained weight. Roberts informed his supervisor, Dennis Blake, that he had Graves disease, that it was treatable with medication and that it would not affect his job performance.

On September 30, 1992, Roberts, by his own admission, repeatedly refused the direct orders of Blake concerning a note Roberts had written at Blake's desk which Blake asked to see. The shop steward was called and told Roberts to show Blake

the note. Roberts admitted at trial that Blake told him, after reading the note, that Roberts' actions were childish and a waste of time and that he was on notice that if that kind of behavior continued, Blake would take further action.

On the following Monday, October 5, 1992, Blake ordered Roberts to pick up an empty wire spool lying on the floor near Roberts' work area. Roberts did not pick up the spool, but resumed welding. Blake did not say anything more to Roberts but left. Roberts did not pick up the spool at any time during his shift or during the course of the next day, October 6, 1992, nor did he ask anyone else where the spool was located.

The following day, when Blake noticed the spool had not been discarded, he once again asked Roberts to pick up the spool. According to Roberts' own trial testimony, Blake then said, "Pick it up, that's an order." Roberts responded, according to his own testimony, "I really don't appreciate the way you said that." Blake then said, "Well, pick it up, that's an order." Roberts said "Okay," but did not pick up the spool. Instead, he resumed welding. Roberts admitted that Blake's orders on October 5 and 6 were direct orders and that he did not comply with either order.

Roberts testified that he continued to work until there was a break in the production line and then looked for the spool, which he did not find. Two other coworkers who were present, however, testified that Roberts did not look for the spool but that they did. One of those coworkers, James Woolsey, testified that he found the spool within five minutes, that it was in the open and that is was visible from Roberts's work area.

After Blake reported Roberts' repeated acts of insubordination to Kay Merz, Crane's Human Resources manager, Merz concluded that Roberts should be suspended for "blatant insubordination" pending further investigation. Ron

Wilson, Blake's supervisor and the general foreman of the plant, concurred with the suspension and Roberts, in the presence of L.C. Monehan, the shop steward, was informed of the suspension. Roberts then asked Wilson or Monehan, "What am I supposed to do, show this guy the color underwear I got on if he asks me?" Monehan told Roberts that he was required to carry out the instructions of his supervisor.

Following Roberts' suspension, Edwin Barutio, Crane's Vice President of Human Resources, conducted an investigation of the incident, interviewing Blake, Monehan and Wilson and examining Roberts' personnel file. Barutio then made the decision to terminate Roberts after discussing the situation with Kay Merz. Barutio testified that his reasons for terminating Roberts were because Roberts had engaged in several instances of blatant insubordination within a very short period of time, the incidents were highly visible to other employees and Roberts' attitude during these incidents was "cavalier." Barutio also considered Roberts' seniority status.

Immediately after he was suspended, Roberts filed a grievance with the Union. Roberts did not include in his grievance any claim that he was being discriminated against because of any perceived disabilities. On October 20, 1992, a third step grievance hearing was held between Roberts, the union and the company. Roberts did not claim at the third step grievance hearing that he was being discriminated against because of his Graves disease or the perception that he had HIV or AIDS, although he was permitted to explain the incidents of September 30, October 5 and October 6 as he saw them. Barutio testified at trial that the third step grievance hearing was the first time he had ever seen Roberts.

Crane thereafter denied Roberts' grievance. It was undisputed at trial that Barutio made the decision to deny the grievance and terminate Roberts. Barutio's decision to deny

the grievance was based on his disbelief of Roberts' version, Roberts' repeated insubordination, and Roberts' "flippant attitude," as demonstrated by his remarks regarding the color of his underwear. Barutio also testified that when he denied the grievance, he did not know that Roberts had Graves disease and had heard no rumors about Roberts contracting AIDS or HIV.

The Union notified Roberts on November 17, 1992 that it would not process Roberts' grievance to the next step because of lack of merit. Union representative Soutier testified that the union decided not to arbitrate the matter because he believed that Blake's requests were reasonable, that Roberts' acts of insubordination occurred over a two-day period and because he did not believe that Roberts had forgotten to pick up the spool on October 5.

At trial, as proof that he was discharged because Crane mistakenly perceived his Graves disease to be HIV or AIDS, Roberts presented the testimony of several other employees, who were not members of management, that they noticed that Roberts was losing weight, looked tired and had bulging eyes in early 1992. Not one of these employees, however, testified that they believed Roberts had AIDS. In fact those witnesses testified that they did **not** believe that Roberts had AIDS or HIV. The **only** witness who testified that he thought that Roberts might have HIV or AIDS was a Paint Department employee, Wes Kelley, who testified that another bargaining unit employee, Michael Branscum, advised him not to use Roberts' respirator because he may have AIDS. This witness also testified, however, that nothing else was said, no one else was present, that he did not repeat the alleged statement to anyone, that he never advised company officials of the alleged statement and had no evidence that the other employee relayed his alleged concern to representatives of the company.

The only other comments regarding HIV or AIDS adduced at trial were two alleged jokes by bargaining unit employee Patrick Brown that Roberts may have had HIV. Employee John Ray testified that Brown jokingly suggested that Roberts had AIDS while a number of employees were at a time clock in the vicinity of Blake. Brown denied telling anyone that he believed Roberts had AIDS. Ray conceded that Brown communicated the alleged remark in a joking manner, that when the statement was made, Ray took it as a joke, that Blake, while allegedly at his desk doing paperwork in the vicinity of the time clock, did not respond to the joke and did not acknowledge the joke in any manner. Ray also admitted that he had never heard Blake speak to anyone about the possibility of Roberts having the HIV virus, never heard any company representative speculate that Roberts had HIV or AIDS and never advised any company representative of Brown's alleged joke. Ray conceded that he knew of no facts that would make him believe that Blake, Wilson, Merz, Barutio or any other company official believed that Roberts had HIV or AIDS.

Bargaining unit employee Kenneth Garner also testified that Brown expressed to him Brown's view that Roberts might have AIDS. Garner admitted that when Brown allegedly told him that Roberts may have AIDS, no company representative was present, the statement was made on one occasion only and that Garner did not disseminate the statement to anyone else. Garner also conceded that during the period of June to October 1992, the alleged comment of Brown was the only one he heard regarding the possibility that Roberts had AIDS, that he possessed no evidence that Brown ever told Blake that he believed Roberts was HIV positive or had AIDS and that no supervisor ever advised him that the company perceived Roberts to have AIDS or HIV.

Aside from these three comments made by bargaining unit employees, no other witness testified that they heard any rumors

that Roberts may have had AIDS, HIV or Graves disease. Witnesses Gary Inness, Patrick Brown, James Woolsey, Marvin Mullen, Mike Branscum and Charles Goodson, all Crane employees, testified that they had **not** heard any rumors that Roberts had HIV or AIDS and they had not heard any company representative speculate that Roberts had AIDS or was HIV positive. Several of these employees also testified that nothing the company said or did led them to believe that any representative of Crane perceived Roberts as being HIV positive or having AIDS. In fact, not one witness could corroborate Roberts' allegation that any company representative or supervisor, including Blake, Barutio, Merz or Wilson, perceived that Roberts had AIDS or HIV.

Roberts' own testimony at trial was replete with admissions that he did not have any evidence to support his claims of discrimination based on perceived disabilities. He admitted at trial that he gave sworn testimony in January of 1993 in which he stated that he did not know why he was fired. During that testimony, Roberts did not contend that he was fired for any perceived disability. He also admitted during trial that in January of 1993 he did not believe his discharge was because of a perceived disability and that from January of 1993 to the time of trial, he had learned no new facts which would make him think he was the victim of a perceived disability. He also admitted that at the time he gave his deposition in October of 1994, he had no evidence that the company perceived him as having HIV. He admitted during cross examination that he had no more evidence at the time of trial than he had at his deposition, that is, none. Roberts also testified that he never advised National Vendors that he considered himself to be disabled or handicapped, never perceived himself to be disabled nor felt he was being perceived as disabled, never claimed discrimination on the basis of a perceived disability, never told Blake or other officials of Crane that he was HIV positive and was never told

by a company official that he was regarded as being either HIV positive or having AIDS. Roberts also testified at trial that none of the "HIV/AIDS gossip" alluded to during trial was among company officials, supervisors or management and that none of the comments he believed to be supportive of an alleged perception were linked in any way to company representatives. Roberts conceded at trial that he lacked evidence that Blake perceived him as being HIV positive in 1992, and that he lacked evidence supportive of the assertion that Crane perceived him as being HIV positive even as of the date of trial. In fact, Roberts admitted that he had **no evidence** to support his claim that the company perceived him as having HIV or AIDS.

In spite of the complete dearth of evidence that the relevant decisionmaker at Crane perceived Roberts to be disabled and Roberts' own admissions at trial, the district court permitted Roberts' claims under the ADA and the MHRA to go to the jury. On September 19, 1995, the jury returned a verdict in Roberts's favor for actual damages in the amount of $535,000. On February 26, 1996, the court entered judgment on the verdict but reduced the total award to $335,460 based on the statutory limitations imposed by 42 U.S.C. § 1991(b)(3) on compensatory and punitive damages. The district court also denied Roberts' request for reinstatement and deemed an award of front pay to be inappropriate.

Following the district court's denial of post trial motions, including renewed motions for judgment as a matter of law by Crane and District 9, Respondents filed timely notices of appeal. Roberts also filed a cross appeal. The Eighth Circuit determined that Roberts' evidence presented at trial was insufficient to support the jury's verdict on Roberts' claims against Crane and District 9 and held that the district court had erred in failing to grant defendants' motions for judgment as a matter of law on Roberts' claims. The Eighth Circuit recognized that Roberts'

entire case against Crane was based on Roberts' own speculation and that Roberts had never linked the alleged rumors about his illness to the relevant decisionmaker at Crane, Edwin Barutio. The Eighth Circuit committed no error in reaching this conclusion and, contrary to the assertions contained in the Petition, it did not so depart from the accepted and usual course of judicial proceedings as to justify the exercise of this Court's supervisory powers.

REASONS FOR DENYING THE WRIT

Roberts' Petition for Writ of Certiorari is based solely on his disagreement with the Eighth Circuit's recognition of the speculative nature of Roberts' claims and the jury's verdict. Roberts' disagreement with the Eighth Circuit's reasoning, however, does not constitute a sufficient basis for this Court to exercise its supervisory power over the Court of Appeals and issue a writ of certiorari. There is simply nothing about this case which merits review by this Court, either because of disagreement among the Circuit Courts of Appeals, because an important issue of federal law should be resolved or because the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Indeed, many of the questions which Roberts asserts are presented for review are not even raised by the Eighth Circuit's opinion. For example, Roberts contends that the question of "whether a perceived disability claim under the Americans with Disabilities Act will require Plaintiffs to produce direct evidence of the Defendant's perception," is at issue. (Petition, at i). The Eighth Circuit, however, never held that direct evidence of perception of a disability was required under the ADA; it simply held that Roberts had not presented *any* evidence that the relevant decisionmaker, Edwin Barutio, perceived Roberts to

be disabled in any way. Similarly, Petitioner asserts that the question of "[w]hether a perceived disability claim under the Americans with Disabilities Act requires a record of actual impairment before liability may be imposed for being regarded as an impairment" is an issue raised by the Eighth Circuit's opinion. (Petition, at i). Contrary to Roberts' assertions, however, the Court of Appeals did *not* rule that a perceived disability claim required proof of an actual impairment; it held that a plaintiff in a perceived disability case must prove perception on the part of the relevant decisionmaker that the plaintiff was disabled within the meaning of the ADA and concluded that, in this case, such a fact had not been proven. Nor did the Eight Circuit hold that "statistical evidence" offered to demonstrate pretext "must be exact in nature and character of the offense to allow similarly situated comparisons," as Roberts also contends in his Petition. (Petition, at i). The Eighth Circuit simply held that Roberts had not established that the employees with which he wished to be compared were similarly situated. In fact, because Roberts presented *no* evidence that those employees were not in the protected class, it is disingenuous for him now to argue that the Eighth Circuit's analysis is flawed.

Two of the other issues raised by Roberts in his Petition are simply factual inquiries — whether his Graves disease "mistakenly believed to be HIV or AIDS, qualifies as a perceived disability under the Americans With Disabilities Act" and

> whether direct evidence of perceived disability by a chief shop steward who participated in the grievance process is sufficient to impose liability against a Union under the Americans With Disabilities Act.

(Petition, at i). The Eighth Circuit correctly held that Roberts had not presented at trial sufficient evidence for either of these findings and that Crane and the Union were, therefore, entitled

to judgment as a matter of law. Roberts' disagreement with the Eighth Circuit's review of the evidence, however, is not a sufficient basis for the granting of a writ of certiorari.

In fact, the only question even arguably raised by the Eighth Circuit's opinion is whether it applied the correct standard of review to its evaluation of the evidence presented at trial. With respect to that issue, certiorari is justified only if the Court of Appeals' opinion "has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10(b), Rules of the Supreme Court of the United States. It is clear from the Eighth Circuit's opinion, however, that it applied the correct standard of review, analyzed the evidence at trial properly and did not depart at all from "the accepted and usual course of judicial proceedings." The issuance of a writ of certiorari, therefore, is not justified.

It is well-established that an appellate court reviews *de novo* a district court's denial of a motion for judgment as a matter of law brought pursuant to Rule 50 of the Federal Rules of Civil Procedure, applying the same standards as the district court. *DeJarnette v. Corning, Inc.*, 138 F.3d 293 (4th Cir. 1998); *Tidwell v. Carter Products*, 135 F.3d 1422 (11th Cir. 1998); *Tschira v. Willingham*, 135 F.3d 1077 (6th Cir. 1998); *Beal Mortgage, Inc. v. Federal Deposit Insurance Corporation*, 132 F.3d 85 (D.C. Cir. 1998); *Nicks v. State of Missouri*, 67 F.3d 699 (8th Cir. 1995); *Sullivan v. National Football League*, 34 F.3d 1091, 1096 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1252 (1995). The Court of Appeals, however, need not show deference to the trial court's assessment of the sufficiency of the evidence. *Tschira*, 135 F.3d at 1081. The appellate court's task in reviewing a judgment entered on a jury verdict "is simply to inquire whether, viewed in the light most favorable to [the nonmoving party], the evidence at trial supports the verdict."

Rademaker v. Nebraska, 906 F.2d 1309, 1311 (8th Cir. 1990); *see also Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir. 1997) (en banc), *cert. denied*, 117 S. Ct. 2510 (1997). A jury verdict should be reversed for insufficient evidence if the appellate court concludes that "no reasonable juror could have returned a verdict for the non-moving party." *Ryther*, 108 F.3d at 836. Although the nonmoving party is entitled to "the benefit of all reasonable inferences from the evidence," a court should grant a motion for judgment as a matter of law when the nonmoving party has presented insufficient evidence "to support a jury verdict in his or her favor." *Abbot v. City of Crocker*, 30 F.3d 994, 997 (8th Cir. 1994); *see also Nicks*, 67 F.3d at 704. In addition, inferences in favor of the non-moving party "must be more than speculation or conjecture to be reasonable." *Day v. Johnson*, 119 F.3d 650, 654 (8th Cir. 1997).

The standard set forth above is precisely the standard of review applied by the Eighth Circuit in this case. (App. A, at 9-10). The Court of Appeals acknowledged that it was required to accord Petitioner "the benefit of all reasonable inferences," (App. A, at 10), and it did so. Even viewing the evidence "in the light most favorable to Roberts," (App. A, at 15), the Court concluded that the evidence simply showed that "Roberts was terminated because he failed to follow his supervisors's orders," (App. A, at 15), and not that Crane perceived him to be disabled or fired him based on such an alleged perception. The Court of Appeals recognized that Roberts' claims were based on "unsupported speculation" that the relevant decisionmaker had heard rumors that he had AIDS or HIV and it correctly surmised that such speculation was "insufficient to permit a reasonable jury to find for him on the issue of Crane's knowledge of those rumors." (App A, at 12). There was nothing incorrect about the Court of Appeals' standard of review or its application of that standard to the evidence presented at trial.

In support of his Petition, Roberts gives an exhaustive summary of his version of the evidence presented at trial to bolster his argument that this Court should exercise its supervisory authority over the Court of Appeals. Petitioner's recital of the facts, however, is no more than a disagreement with the Eighth Circuit's analysis of the evidence presented at trial and in no way demonstrates that the Eighth Circuit so far departed from the "accepted and usual course of judicial proceedings" as to justify an exercise of this Court's supervisory power. Moreover, in attempting to enhance his argument, Roberts, as he did in the Court of Appeals, mischaracterizes the evidence presented at trial in several major respects.

For example, Roberts repeatedly asserts in his Petition that his co-workers believed him to have AIDS and believed that he was going to die. (Petition, at 1, 14). In fact, as explained above, of the nine co-workers whose testimony Roberts presented at trial in support of his claims, only **one** testified that he actually believed that Roberts had HIV or AIDS. Each of these witnesses denied that they had ever heard **any** members of management make **any** references to a perception that Roberts may have had AIDS or HIV. Most significantly, Roberts did not establish that Edwin Barutio, the *decisionmaker* with respect to Roberts' termination, believed him to have HIV or AIDS or believed that his condition substantially limited any of his major life activities. Similarly, there was no evidence that Barutio had any knowledge of Roberts' Graves disease or believed that it substantially limited any of his major life activities. Further, only *one* witness — Gary Inness — testified that he "kind of thought he was going to die." (App. D, at 71). Inness also testified, however, that "I didn't know what was wrong with him." (App. D, at 71). There was **no** other testimony that any employee — bargaining unit or supervisor — believed that Roberts was dying. Roberts' statement that "Roberts' co-workers thought he was going to die," (Petition, at 14), is, consequently,

unsupportable. Roberts also fails to note that Blake himself knew Roberts' symptoms to be caused by Graves disease; knew, because Roberts had told him, that the disease was controlled by medication; and, further, knew that the disease did not interfere with Roberts' performance of his job. The evidence was undisputed, therefore, that no one at Crane, including Blake and Barutio, believed Roberts to be substantially limited in his major life activities because at HIV, AIDS or Graves disease.

Roberts also contends that Patrick Brown stated "on two separate occasions, in front of others including shop steward Monehan and supervisor Blake, that Petitioner had AIDS." (Petition, at 17). Roberts once again exaggerates the trial testimony to support his version of the facts. At trial, John Ray testified that Patrick Brown joked with a group of employees, saying Roberts was losing weight "because he probably has AIDS." Ray testified that the group of employees did **not** include Dennis Blake, but that Blake's desk was in the area and Blake was working at his desk at the time. There was no evidence that Blake even heard the joke. On cross examination, Ray admitted that Blake did not react in any manner and continued working at his desk without acknowledging the joke. Significantly, Roberts admitted at trial that he had no evidence that Blake perceived him as being HIV positive in 1992 and had no evidence to support his claim that Crane perceived him as having HIV or AIDS.

As he did at trial and in the Court of Appeals, Roberts also seeks to mischaracterize the position of Michael Branscum, an employee who allegedly made a statement to co-worker Wes Kelley that Roberts may have had AIDS. (Petition, at 1, 5, 16). Thus, Roberts contends that Branscum was an "assistant supervisor," (Petition, at 1, 16), and that one of Branscum's duties was to inform his supervisor "of any employees who may be ill." (Petition, at 5). In fact, Branscum was a bargaining unit employee who held the position of group leader in the

Paint Department, where Roberts worked for two weeks. In an attempt to make the jury believe that Branscum was a member of management and **not** a hourly employee, counsel for Roberts throughout trial repeatedly referred to Branscum and other group leaders as "assistant supervisors." The district court, however, sustained Crane's objection to the characterization of group leaders as "assistant supervisors." Branscum himself denied that his job was to supervise other employees and Roberts presented no testimony to the contrary. Thus, Roberts' references to Branscum as an "assistant supervisor" is contradicted not only by the testimony at trial but by the trial court's ruling on that testimony, a ruling which Roberts never appealed.

Roberts also misstates the facts concerning the events leading to his discharge. With respect to the note-writing incident, he states that "Mr. Blake did not cite Petitioner for any wrongdoing after Petitioner revealed the note." (Petition, at 6). This statement is directly contrary to the testimony of both Roberts and Blake. Roberts admitted on cross examination that Blake told him at the time of the incident that Roberts' actions were childish and a waste of time and that Roberts was placed on notice that if that kind of behavior continued, Blake would take further action. Roberts admitted that he understood and acknowledged Blake's warning.

Roberts also alleges that "Mr. Blake conceded that he had no authority to seize or demand to see a note written by an employee on break-time." (Petition, at 6). In fact, Blake testified that he did not know of a specific rule which would permit him to look at the note, but he did not testify that it was not within his supervisory power to do so. The fact that there was no specific rule on the subject did not negate Blake's overall supervisory authority. More importantly, Roberts conceded on cross-examination that some of Blake's requests to review the note in question occurred during **non**break time — *i.e.* during working time.

With respect to the incidents regarding the spool on October 5 and 6, 1992, Roberts once again misstates the testimony of witnesses. Roberts admitted on cross examination at trial that he received direct orders from Blake to pick up the spool on October 5 and 6, 1992 and that he did not comply with either of those direct orders. Roberts also alleges that on October 6, when he was caught up with production, he "looked for, but could not find the spool Mr. Blake had referred to." (Petition, at 8). Both Woolsey and Inness testified, however, that although they looked for the spool, Roberts did *not*. Woolsey testified that he found the spool within five minutes, that it was in the open and that it was visible from Roberts' work area. Roberts also testified that on October 6, Blake gave him a direct order at least twice to pick up the spool and that his response was "I don't appreciate the way you said it." Roberts then admitted and that he did **not** pick up the spool at any time on the 5th or the 6th.

Roberts also contends, as part of his "set up" theory, that "it was odd that his supervisor asked him to work overtime on October 6, 1992," and that "[c]ommon practice by Crane would have had Petitioner working overtime at the station where the other employee was transferred to." (Petition, at 9). There is no testimony, however, that there was any such "common practice" at Crane. The testimony upon which Petitioner relies for this proposition is his own and is simply his disagreement with Blake's actions. Roberts testified that another welder was on the line before Roberts arrived and that "what Dennis should have done is he was on that line and he should have stayed right there where I got put." (App. D, at 70). Neither Petitioner nor any other witness testified that it was Crane's "common practice" during overtime to keep welders on the lines they had been working on during regular time. Petitioner's assertion is based solely on his own belief as to what "should" have been done.

Although he does not dispute that Barutio was the decisionmaker with respect to his termination, Roberts repeatedly attempts to infer a sinister motive from the fact that Blake's memorandum regarding the October 6 incident contains the term "Termination" in the subject heading but the letter terminating Roberts was dated October 9, 1992. (Petition, at 8-9). In fact, the testimony at trial was undisputed that *Barutio* and not Blake or Wilson made the decision to terminate Roberts and that *Kay Merz*, not Blake or Wilson, made the decision to suspend Roberts. Moreover, both Blake and Barutio provided a simple explanation for the use of the word "Termination" in Blake's typewritten memorandum, which Roberts did not rebut at trial. Blake testified that he completed a handwritten memo on October 6 documenting the incidents of October 5 and 6 and that Wilson's secretary typed the memorandum at a later date. He also testified that he did not put the subject "Termination" on his handwritten memo but that the secretary later filled in all the headings on the memo, including the "Termination" language. Blake testified that he did *not* know that Roberts would be discharged when he wrote the memorandum. Barutio corroborated Blake's testimony, stating that he was given Blake's handwritten memo, which did not contain any subject headings and did not contain the word "Termination." Roberts did not dispute this testimony or offer any contradiction of it.

Significantly lacking from Roberts' argument and statement of facts is *any* evidence that the decision maker with respect to Roberts's termination, Edwin Barutio, had any knowledge or perception that Roberts had Graves disease and/or HIV or AIDS or that Barutio perceived Roberts to be substantially limited in any of his major life activities. In fact, the uncontradicted evidence at trial was that Barutio did not even meet Roberts until *after* he made the decision to terminate him, had never heard any HIV or AIDS rumors about Roberts and had never been told by anyone that Roberts had Graves disease.

In his Petition, Roberts also relies heavily on "uncontradicted statistical evidence" of what he believes to be pretext by Crane with respect to his discipline. (Petition, at 10, 24-26). He alleges that the Court of Appeals' treatment of this alleged "statistical evidence" was "the most comprehensive misapprehension of the facts and law." (Petition, at 24). Roberts, however, neglects to mention that at trial he presented not one iota of evidence that the workers with whom he seeks to be compared were similarly situated employees in the non-protected group, a prerequisite for establishing disparate treatment.

It is well settled that in order to prevail on a claim that non-protected employees were treated differently, a plaintiff must prove that he or she was treated differently than **similarly situated** employees in a non-protected group. *Harvey v. Anheuser-Busch*, 38 F.3d 968 (8th Cir. 1994); *Ray v. Tandem Computers, Inc.*, 63 F.3d 429 (5th Cir. 1995); *Mitchell v. Toledo Hosp.*, 964 F.2d 577 (6th Cir. 1992). To demonstrate that others were similarly situated, the plaintiff must prove that

> the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have been engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell, 964 F.2d at 582-83; *see also Harvey*, 38 F.3d at 970; *Phillips v. Holladay Property Services, Inc.*, 937 F. Supp. 32, 36 (D.D.C. 1996); *Perkins v. Regents of the University of Michigan*, 934 F. Supp. 857, 862 (E.D. Mich. 1996); *Fuller v. GTE Corp./Contel Cellular, Inc.*, 926 F. Supp. 653 (M.D. Tenn. 1996); *Mazzella v. RCA Global Communications*, 642 F. Supp. 1531 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987).

As the Court of Appeals held, Roberts presented no evidence that he was similarly situated to the individuals to whom he wishes to be compared. He did not present any evidence that any of the employees with whom he wishes to be compared had the same supervisor, worked in the same position, or engaged in similar conduct. Of those cited for insubordination discussed by Roberts in his Petition, only six, including Roberts, were supervised by Blake. Of those six, there is **no** evidence that any worked in the same position as Roberts. In fact, two of the six, including Roberts, were terminated for insubordination, a percentage of 33%, hardly evidence of disparate treatment.

Perhaps more importantly, Roberts presented **no** evidence that these employees engaged in conduct similar to that of Roberts. Although each of the six were cited for insubordination, there was no demonstration the insubordination of the other employees was as serious, visible and repeated as was Roberts'. In fact, Barutio testified to the contrary and Roberts did not offer any evidence to dispute Barutio's testimony. Roberts did not establish that any of these employees engaged in at least three acts of direct insubordination over a period of three working days. Roberts presented no evidence that the other employees' insubordination was "highly visible" as Barutio testified Roberts' was, that the other employees exhibited the "cavalier attitude" which Roberts exhibited, or that these employees' acts seriously undermined their supervisor's authority. All of these circumstances were factors in Barutio's decision to terminate Petitioner.

Most importantly, however, Roberts provided absolutely no evidence that the employees with whom he wished to be compared were not in the protected class, *i.e.*, that they were not disabled. Indeed, Roberts presented absolutely no evidence regarding the physical condition of any of these employees. The jury was presented with no information that those employees

were not in the protected class. The Eighth Circuit was correct, therefore, in its assessment that Roberts had failed to prove different treatment from similarly situated employees.

Moreover, Roberts' recitation of the statistical evidence presented at trial is simply incorrect. The uncontradicted statistical evidence to which Petitioner refers actually showed that four employees of thirty-one who were terminated were discharged for insubordination, while the larger majority of workers were discharged for less serious offenses like absenteeism or production interference. None of the employees disciplined for insubordination had committed repeated acts of insubordination over as short a time period as Roberts. Those who had committed repeated acts of insubordination did so over extended periods of time, with the incidents four months to almost two years apart. The other employee discharged for insubordination, Clarence Bowens, actually was disciplined for only four acts of insubordination — not six, as Petitioner claims — and those incidents occurred over a time period of over two years. Bowens was in fact discharged for refusing the direct orders of his supervisor, Dennis Blake. Barutio testified, without contradiction, that in assessing discipline to be given for a particular incident, it was the company's practice, as well as standard industry policy, not to take into consideration discipline that was given to an employee over twelve months before.

Thus, Roberts' alleged "uncontradicted statistical evidence" of discrimination was, as the Eighth Circuit held, insufficient to demonstrate that he was disparately treated because of his alleged perceived disability. Roberts' theory that he was singled out for termination, and that his discipline was "inconsistent with [Crane's] progressive system of discipline," (Petition, at 26), was not warranted by the evidence presented at trial. In fact, James Woolsey and Gary Inness testified that they were

well aware that Roberts' refusal to obey the directions of his supervisor could subject him to termination; they testified that they looked for the spool in order to avoid trouble for Roberts.

In spite of the fact that it was his own failure to present sufficient evidence to support the jury verdict which led to reversal, Roberts accuses the Eighth Circuit of "bias," (Petition, at 19), contends that the appellate court improperly adopted Respondents' "version of the evidence," (Petition, at 2, 15, 18, 22, 23-24, 27, 29) and argues that it exhibited no deference to the jury verdict. (Petition, at 2, 15, 18, 26). Roberts' argument, apparently, is that the Court of Appeals was permitted to look only at the evidence Roberts himself presented at trial, and was not permitted to examine the entire record, including the uncontradicted evidence put forward by Respondents. Contrary to Petitioner's argument, however, the federal courts of appeals are entitled to examine the *entire* record to determine if there was sufficient evidence to support the jury's verdict when reviewing the denial of a motion for judgment as a matter of law. *Furr v. Seagate Technology, Inc.*, 82 F.3d 980 (10th Cir. 1996); *Stockstill v. Shell Oil Co.*, 3 F.3d 868 (5th Cir. 1995). The Eighth Circuit did not "adopt" Respondents' version of the evidence; it simply ruled that Roberts' evidence of disability, perception, discrimination and causation was insufficient to justify submitting the case to the jury. The Court of Appeals' reliance on Respondents' evidence occurred only when such evidence was uncontradicted, such as Barutio's testimony that he had never seen Petitioner until the third step grievance hearing. Nor did the Court of Appeals determine *any* credibility issues: all reasonable inferences were viewed in Roberts' favor.

Roberts also alleges that the Eighth Circuit required him to prove by direct evidence perception on the part of Crane that he was substantially limited in his major life activities. (Petition, at 3, 16, 29). There is no indication anywhere in the Court of

Appeals' opinion, however, that it required any such thing. The Eighth Circuit held that, in order to demonstrate a prima facie case under the ADA and the MHRA, Roberts was required to establish that the decisionmakers at Crane and the union regarded him as having a condition which substantially limited his major life activities. (App. A, at 10). After drawing all reasonable inferences in favor of Roberts, the Eighth Circuit concluded that Roberts had not come forward with sufficient evidence — direct or circumstantial — that established that the decisionmakers at Crane or District 9 regarded him as having such a condition. The Court of Appeals also held that even if the decisionmaker at Crane held such a perception, Roberts had failed to adduce any evidence that he was terminated because of the alleged perceived disability. (App. A, at 13). There is nothing in the Court of Appeals' opinion that demonstrates that Roberts' lack of direct evidence of perception was the reason the Eighth Circuit reversed the decision of the district court. Instead, it is apparent that the Eighth Circuit concluded that Roberts had not established sufficient circumstantial evidence to demonstrate a perception of disability because he "failed to link the alleged rumors to Crane decisionmakers." (App. A, at 11-12). Roberts' total lack of any evidence of perception or causation was the reason for the Court of Appeals' holding and *not* any error on the part of the Eighth Circuit in requiring direct evidence.

Moreover, while the Court of Appeals was required to view all reasonable inferences in favor of Roberts, all inferences drawn by the jury must have been *reasonable* and not speculative. Roberts' extensive recitation of his version of the evidence does not disguise the fact that his entire case was built upon his own speculation, speculation which the jury accepted but which the Court of Appeals held to be insufficient to impose liability. The inferences drawn by the jury were not reasonable, but speculative and conjectural. Petitioner's arguments

notwithstanding, the crux of Roberts' trial evidence and his argument to the jury required unreasonable and speculative inferences that the jury, as a matter of law, was not permitted to make. As the Court of Appeals ruled, there is not one scintilla of evidence to link the alleged rumors of HIV or AIDS (which consisted of two comments and one joke by and among hourly employees) to the decisionmaker, Barutio. Liability based on such conjecture and speculation is not permitted under the ADA, the MHRA or any other law, as the Eighth Circuit correctly held.

Thus, Roberts' arguments that the Court of Appeals applied the incorrect standard of review, required direct evidence of perception and deprived him of his Seventh Amendment rights are both factually and legally unsound. The Eighth Circuit reversed the district court's judgment not because it improperly applied the standard of review but because its reading of the entire record submitted at trial showed that Roberts had failed to meet his burden of proving that Crane and District 9 discriminated against him. Simply because the Eighth Circuit refused to accept Roberts' speculation as a basis of liability does not mean that its judgment was incorrect or that its decision so far departed from the accepted and usual course of judicial proceedings that the supervisory power of this Court should be exercised.

CONCLUSION

Petitioner has presented this Court with no cognizable reason to review the Eighth Circuit's decision. There is no conflict among the circuits on an important matter, no significant federal question which should be settled by this Court and no decision which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Nothing in the Eighth Circuit's opinion is inconsistent with the appropriate standard of review of a district court order denying judgment as a matter of law and nothing in the Court of Appeals' holding warrants review by this Court.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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